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No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1968

F. H. SPARKS CO., INC.,

Defendant-Petitioner,

vs.

THE GEORGE SOLLITT CONSTRUCTION COMPANY,

Intervening Plaintiff-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Questions Presented	2
Statement of the Case	2
Argument	10
I. Sparks Seeks To Have an Order Not in Issue Reviewed	10
II. There is No Conflict In Decisions Among the Courts of Appeal Over the Definition of The Word "Definite" Used in 9 U.S.C. § 10 (1965)	10
III. There is No Important Question of Federal Law Presented In This Case	13
A. There Is No Conflict in Decisions of This Court	13
B. There Is No Question That Needs to Be Settled By This Court	16
IV. There is No Need For This Court to Exercise Its Power of Supervision	16
Conclusion	18

TABLE OF CITATIONS

Cases

Application of Zephyr Const. Co., Inc., 7 A.D. 2d 915, 182 N.Y.S. 2d 946 (1959)	15
Arlington Towers Land Corp. v. John McShain, Inc., 150 F.Supp. 904, 925 (D.C.Dist. 1957)	15
Ballantine Books, Inc. v. Capital Distributing Co., 302 F. 2d 17 (2d Cir. 1962)	10, 12

PAGE

Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956) 15

Carr v. American Ins. Co., 152 F.Supp. 700 (E.D. Tenn. 1957) 15

Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711 (7th Cir. 1967) 5

In Re E.A. Laboratories, Inc., 50 N.Y.S. 2d 222, 223 (Sup.Ct. 1944) 15

International Ass'n of M. & A. Wkrs. v. Aerojet-General Corp., 263 F.Supp. 343 (D.C. Cal. 1966) 15

J.P. Greathouse Steel Erectors, Inc. v. Blount Bros. Constr. Co., 374 F.2d 324 (D.C.Cir.) cert. denied, 389 U.S. 847 (1967) 16

LaVale Plaza, Inc. v. R.S. Noona, Inc., 378 F.2d 569, 573 (3d Cir. 1967) 15, 16

Overseas Distrs. Exch., Inc. v. Benedict Bros. & Co., Inc., 5 A.D. 2d 498, 173 N.Y.S. 2d 110, 112 (1958) 15

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 14, 16

The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932) cert. denied, 288 U.S. 601 (1933) 15

Todd Shipyards Corp. v. Industrial U. of Marine & Ship Wkrs., 242 F.Supp. 606 (D.N.J. 1965) 15

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 13, 15

Statutes

PAGE

9 U.S.C. § 10(d) 2

9 U.S.C. §§ 4, 10 (1965) 7

28 U.S.C. § 1292(b) 9

9 U.S.C. § 1 et seq. 16

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To: The Honorable Chief Justice and Associate Justices of the United States:

Respondent, The George Sollitt Construction Company ("Sollitt"), the intervening plaintiff in the action below, submits this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on behalf of petitioner, the F. H. Sparks Company, Inc. ("Sparks"), defendant below.

QUESTIONS PRESENTED

1. Was it error for the District Court to confirm the arbitration award and to reserve to the Court questions which the arbitrators had held to be beyond their jurisdiction to consider?

2. Was it error for the District Court to partially vacate an arbitration award (in a manner which did not affect the findings of the arbitration panel or the lump sum award and who was to pay it) but which had failed to pass upon an important issue which had been presented to the arbitrators by one of the parties, said failure leaving the parties uncertain as to the time and manner the arbitration award was to be paid, and for the District Court to remand to the Panel that issue in accordance with Section 10(d) of the Federal Arbitration Act (9 U.S.C. §10(d))?

STATEMENT OF THE CASE

Because petitioner's statement of facts is replete with omissions which demonstrate the lack of conflict of decisions, the lack of any issues significant enough to warrant review by this Court and the correctness of the decisions below, respondent sets forth the following statement of facts.

The Principal Action Below

On September 29, 1966 a seven-count complaint was filed in the United States District Court for the Northern District of Illinois against Sparks and Libby-Owens-Ford ("L-O-F") Glass Company for damages allegedly sustained by plaintiffs* due to the failure of the "SparkSys-

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* The plaintiffs in the main case originally were Arthur T. Galt as owner of Maywood Park Race Track and Maywood Park Trotting Association. On March 13, 1967 the Arthur T. Galt Building Trust became a party-plaintiff.

tem" of suspended glazing installed at Maywood Park, (a race track located outside of Chicago) by Sparks with glass furnished by L-O-F. Jurisdiction of the District Court was based upon diversity of citizenship.

The seventh count of the complaint sought to enjoin arbitration proceedings pending between Sparks and Sollitt, but plaintiff's motion to enjoin was denied by the District Court on December 9, 1966.

The arbitration proceedings had been commenced on May 31, 1966 by Sparks notifying Sollitt of its intention to invoke arbitration proceedings for an alleged balance due it from Sollitt under its subcontract with Sollitt and for extra work performed at Maywood. (App. 26.)[1]

The Sparks-Sollitt Subcontract

Sparks was the alleged licensee of a glazing technique whereby large lights of glass were hung or suspended rather than rested on their base. This has been referred to as "suspended glazing" and was sold by Sparks in North America as the "SparkSystem." (R. 98-100.)[2]

Sollitt, as the general contractor, normally had sole discretion in the selection of subcontractors. However, as to the glazing for the main spectator building, Sollitt was directed by the Arthur T. Galt Building Trust ("Building Trust")[3] to subcontract with Sparks for the "SparkSys-

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[1] App. refers to pages of the appendix filed by Sollitt in the Court of Appeals for the Seventh Circuit which has been certified as part of the record herein.

[2] Refers to the Record herein.

[3] The Building Trust was created by Mr. Galt to arrange for and finance the construction work at Maywood Park.

tem of suspended glazing. The Sollitt-Sparks subcontract provided that:

> ". . . It shall be a condition to said payment to the Subcontractor, that, from time to time as may be required by the General Contractor, said Subcontractor shall furnish to the General Contractor waivers of lien and satisfactory statements in writing, verified by affidavit, of the names of all parties furnishing materials and labor, and the amounts due and to become due each. It is further understood that the amounts paid from time to time shall be out of funds received from the Owners [the Building Trust] and in proportion to amounts allocated by the Owner [the Building Trust] for the work included herein, as and when the value of the work or materials furnished is accepted." (Hereinafter referred to as the "payment clause.")

The subcontract also provided in Article 21:

> "Both parties to this agreement hereby agree to be bound by the provisions of record in the American Institute of Architects and on file in the nearest Chapter of the American Institute of Architects, for arbitration of disputes which may arise in connection with the performance of this agreement." (Hereinafter referred to as the "arbitration clause.")

Sparks was fully cognizant of the existence, meaning and effect of the payment clause "on its right to be paid" and that it was contingent upon Sollitt being (1) paid by the Building Trust, and (2) the Building Trust expressly allocating funds for payment by Sollitt to Sparks.

On April 1, 1965 Mr. G. F. Collyer of Sparks wrote Sollitt objecting to the payment clause and suggesting an alternative clause. (App. 4.) On April 6, 1965, Mr. Collyer again wrote Sollitt saying it did not want Sparks' "right to payment to be subject to someone else's ability to collect." (App. 6.)

Despite the reluctance of Sparks, and even though Sollitt was ordered by the Building Trust to subcontract with Sparks thereby depriving Sollitt of any bargaining power it might have had, Sparks duly executed the subcontract, as originally sent it by Sollitt, and agreed, with full understanding, to the terms and conditions of the payment clause.

Failure of the "SparkSystem"

Even before all of the lights of glass were in place at Maywood Park some of them, installed pursuant to the "SparkSystem" and by Sparks personnel, began to crack and break. At no time was the installation 100% unbroken. In December, 1965, the project architect informed Sollitt and Sparks that the "SparkSystem" was not acceptable and had not met the contract guarantees. The lights of glass installed pursuant to the "SparkSystem" were subsequently removed and conventional glazing installed.

The First Appeal to the Court of Appeals

On December 23, 1966 Sollitt was allowed to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure as a party plaintiff in the primary proceedings brought in the District Court. On January 19, 1967, the District Court granted Sollitt's motion to stay the arbitration proceedings.

On April 29, 1967 the United States Court of Appeals for the Seventh Circuit reversed the District Court's order of January 19, 1967, and stayed all legal proceedings between Sparks and Sollitt until the parties had concluded arbitration.*

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* *Galt* v. *Libbey-Owens-Ford Glass Co.*, 376 F.2d 711 (7th Cir. 1967).

The Court intimated no views as to the merits of Sparks' claims against Sollitt.

The Arbitration Proceedings

On May 22, 1967 through May 25, 1967, three arbitrators, Mr. Frederick Wiesinger, selected by Sollitt, Mr. Peter DeJongh, selected by Sparks and Mr. A. L. Spencer, selected by Messrs. Wiesinger and DeJongh, heard evidence and rendered informally a two to one decision that found that Sparks was entitled to receive $100,000.00 on its claims and $879.60 for expenses incurred as a result of the arbitration proceedings. All three arbitrators also agreed, pursuant to the request of counsel for Sollitt and to which counsel for Sparks did not object, that Sollitt was in no way responsible for the glass breakage at Maywood Park.*

On May 31, 1967 the findings and award of the arbitrators were reduced to writing and sent to the parties. That written award provided, in part, that "Sollitt shall pay to Sparks the sum of . . ." (App. 8.)

The award did not state the time or manner in which the award was to be paid. Both of these issues had been raised by Sollitt at the outset of the proceedings and in its opening and closing arguments.

After Sollitt's opening statement, Mr. Spencer stated that he felt the Arbitration Panel was without jurisdiction to consider how or when an award, if any, would be collected. (App. 9-12.) Mr. Conway, counsel for Sparks, apparently agreed. (App. 11.)

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* Sparks in its petition to this Court attempts to imply that this fact was not fully understood by the Court of Appeals. However, the briefs and Court's opinion totally rebuke this position of Sparks.

Sollitt, in its closing statement to the Panel, requested a decision by the Arbitration Panel as to the time and manner payment would be made to Sparks if an award was rendered against Sollitt running to Sparks. However, nowhere in the record of proceedings or in the written award did the Panel state that Sparks was entitled to immediate payment of any arbitration award or that payment to Sparks was contingent upon Sollitt first being paid by the Building Trust and the Building Trust allocating the funds for payment to Sparks. Therefore, the parties were placed in the position of not knowing whether the payment clause was to apply or not to the payment of the award.

Post-Arbitration Motions

On June 7, 1967 Sparks served Sollitt with several motions, including a motion to confirm the arbitration award of May 31, 1967. On June 12, 1967 Sollitt filed its answer to Sparks' motion to confirm and also moved to modify the award.

The District Court Order of June 22, 1967

On June 22, 1967 Sollitt, pursuant to Sections 4 and 10 of the Federal Arbitration Act (9 U.S.C. §§ 4, 10 (1965)), moved:

> (1) to vacate the award, provided that vacation of the award would in no way affect the finding by the Arbitration Panel that Sparks was entitled to the sum of $100,879.60 or that Sollitt was not responsible for the glass breakage.
>
> (2) Sparks and Sollitt be compelled to submit to the Panel the questions of :
>
> (a) whether the 'payment clause' was within the purview of the 'arbitration clause'; and
>
> (b) if it was, whether Sparks was entitled to immediately receive $100,879.60 from Sollitt, without Sollitt first receiving from the Building Trust

> $100,879.60 and without such funds being allocated by the Building Trust for payment to Sparks. (App. 16-18.)
>
> (3) The Court continue generally all the motions filed by Sparks and Sollitt."

The District Court granted Sollitt's motion in its entirety, having found that it was uncertain that the Panel had considered or decided whether it could consider the payment clause. The District Court observed that neither the manner nor the time for payment of the award to Sparks was stated on the face of the award, even though such issues were presented to the Panel for a determination and that a determination was needed in the interest of justice. The Court rather than holding, as Sollitt suggested, that the Panel considered itself to be without jurisdiction to consider the payment clause as being the reason why the award was silent as to time and manner the award was to be paid, remanded that issue to the Panel.

The Remand

On remand to the arbitrators, all filed letters with the American Arbitration Association. Mr. Spencer twice stated that it was his decision that the Panel was without jurisdiction. He said in part:

> ". . . 2. Both sides were clearly informed that, under no conditions would this Panel decide how the money was to be collected and from whom." (App. 21)*

Mr. Wiesinger agreed that the Panel did not have jurisdic-

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* While it is true as Sparks harps that Mr. Spencer questioned the "equity" of such clauses as the payment clause, he did not question its use in the Sollitt-Sparks subcontract. In fact, Mr. Spencer seemingly approved of it in that Sollitt was only the agent of the Building Trust and that the Building Trust had compelled Sollitt to subcontract with Sparks. (App. 22.) Thus Sollitt should have some way to protect itself.

tion. (App. 23-24.) Mr. DeJongh apparently agreed that the Panel was without jurisdiction and then disagreed. (App. 24-25.)

The District Court Order of October 19, 1967

On October 19, 1967, the District Court entered the order purportedly appealed from by Sparks. That order provided:

> (1) The findings of the arbitrators that Sparks was entitled to receive $100,879.60 and that Sollitt was not responsible for breakage of glass at Maywood Park were confirmed.
>
> (2) The findings by the arbitrators that the 'payment clause' of the Sollitt-Sparks subcontract was not within the purview of the 'arbitration clause' of the Sollitt-Sparks subcontract and the resulting conclusion that the Panel was without jurisdiction to decide all questions arising out of such 'payment clause' were confirmed.
>
> (3) As a result of the arbitrators' decision, all questions arising out of the 'payment clause' were reserved to the District Court and continued generally.
>
> (4) Except as otherwise provided, the continued motions of Sparks and Sollitt were denied. (App. 29-31.)

The Second Appeal to the Court of Appeals

Sparks sought and was granted under 28 U.S.C. §1292(b) certification by the District Court to appeal to the Seventh Circuit the October 19, 1967 order. The Court of Appeals granted the appeal. Briefs were filed and oral arguments were heard.

On June 6, 1968, a unanimous decision was rendered by the Court affirming the District Court's order of October 19, 1967.*

It is from that decision that Sparks seeks this Court to grant a writ of certiorari.

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* The Court noted that this decision necessarily indicated approval of the remand order of June 22, 1967.

ARGUMENT

I.

Sparks Seeks To Have An Order Not In Issue Reviewed.

At the outset, the order from which an interlocutory appeal was granted by the District Court and Seventh Circuit and is purportedly the one Sparks seeks this Court to review was the order of the District Court of October 19, 1967, which confirmed the award of the arbitrators that Sollitt shall pay Sparks $100,879.60 and confirmed the decision of the arbitrators, on remand, that they did not have jurisdiction to consider the payment clause. However, in its petition to this Court Sparks in reality seeks to have reviewed questions arising out of the remand order of June 22, 1967. This alone is sufficient grounds to deny Sparks' petition.

This alone is sufficient grounds to deny Sparks' petition.

II.

There Is No Conflict In Decisions Among the Courts of Appeal Over the Definition of The Word "Definite" Used in 9 U.S.C. § 10 (1965).

The case relied upon by Sparks as being in conflict with the decision of the Seventh Circuit in the case at issue clearly demonstrates that Sparks' contention is wholly frivolous, and if anything the authorities relied upon by Sparks show the correctness of that decision.

In *Ballantine Books, Inc.* v. *Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962), Capital had contracted to distribute books for Ballantine. Capital made partial payment to Ballantine for the books received but, because wholesalers bought the books from Capital with the right to return them, Capital was not liable to Ballantine for the balance until six months after specific title passed to the

wholesalers. Capital thus acquired reserves against returns from wholesalers for which it was accountable to Ballantine.

When Capital had refused to pay some $175,000.00 which Ballantine alleged was due it, Ballantine commenced arbitration pursuant to the contract. Among the disputed sums were $4,421.28 allegedly owed to third parties. The arbitrators awarded a lump sum, $151,343.84, to Ballantine as full settlement of all claims. It appears that there was never any issue of the time and manner the award was to be paid to Ballentine.

Capital moved to set aside the award but it was confirmed by the District Court. On appeal one of Capital's objections was that the award was indefinite because it failed to specifically mention the $4,421.28—that is, the arbitrators had not apparently stated how it arrived at the sum of $151,343.84, or whether it included the $4,421.28. This argument was rejected by the Court of Appeals on the ground that it was not proper for the courts to inquire how the arbitrators reached the lump sum figure. 302 F.2d at 22. Furthermore, the court said these were "alleged minor disputes."

In this action, the arbitrators' award of $100,000.00 to Sparks is not now questioned nor was it ever questioned by the Courts below or by Sollitt, nor has the requirement that "Sollitt shall pay Sparks" ever been in issue in the courts below. What had been in issue and was key to an unambiguous and definite award was for the arbitrators to state the *time* and *manner* payment of the award was to be made or to say why the award was silent to this issue. The words "Sollitt shall pay Sparks" did not provide the answer.

Sollitt suggested to the District Court that the silence of the Panel was due to the fact that the Panel felt such questions were beyond its jurisdiction to decide. Clearly,

as the decision on remand showed, the Panel reasserted that it did not consider itself to have jurisdiction to decide those issues which would arise out of the payment clause and therefore had properly refused to enter in the written award any decision or finding whatsoever about the time and manner of payment of the award.

However, because the award failed to state the reason why nothing was decided about the time and manner payment of the award was to be made, especially in light of Sollitt having submitted questions arising out of the payment clause to the Panel, the parties were uncertain whether under the circumstances the arbitrators had considered the payment clause or what Sollitt was to do and under what conditions, if any, it was to pay Sparks. Thus, the award on its face was not "mutual, final or definite", as required under the Federal Arbitration Act before the award could be confirmed by the District Court.

In *Ballantine Books, Inc.* v. *Capital Distri. Co.*, 302 F.2d 17 (2d Cir. 1962), the question was whether the court should refuse to confirm an award when there was no reason not to think that the lump sum award included a provision for *all* claims between the parties. Here the District Court confirmed the lump sum award to Sparks for here also there was no reason not to think that the lump sum included a provision for all claims between the parties. In *Ballantine* the obligation of the parties was clearly settled in that the lump sum was stated on the face of the award to be in settlement of all claims. Here, however, Sollitt and Sparks still had unanswered the vital issue of the time and manner the award was to be paid. In *Ballantine* there never was any question as to the time and manner the award was to be paid. In this case the award was indefinite because the time and manner the award was to be paid was a major issue which went beyond the mere awarding of a lump sum.

Sparks thus misconstrues the decision of the Court of Appeals in this case as it does the decision of the Court in *Ballantine,* in that the two cases, standing side by side, are totally consistent, insofar as the meaning given by the courts of the term "definite." There is no conflict.

III.

There is No Important Question of Federal Law Presented in This Case.

A. There Is No Conflict With Decisions of This Court.

The remand order of June 22, 1967 by the District Court was fully in keeping with the decision of this Court in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.;* 363 U.S. 593 (1960). In that case this Court modified the decision of the District Court so as to require remand to the arbitrators the question of the amounts due employees under a collective bargaining agreement, rather than having the District Court render the decision (363 U.S. at 599):

> "This underlines the fundamental error which we have alluded to in *United Steelworkers of America* v. *American Manufacturing Co.,* [363 U.S. 564 (1960)] decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

This is precisely what the District Court did in this case; it did not invalidate the entire award but rather remanded

only the issues of the payment clause to the Panel* so as to have the judgment of the arbitrators rather than trying to second guess them. This decision gave the parties what they bargained for—a determination by the arbitrators of why they had not passed on questions arising out of the payment clause.

Likewise, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), supports the District Court's action and also demonstrates the lack of any conflict with the decisions of this Court. There this Court held that courts should not interfere when the parties have agreed to arbitration. There the decision was that questions of fraud in the inducement of the contract giving rise to the arbitration should be submitted to the arbitrator when the contract provided that all disputes under the contract were to be resolved by this means.

In the present case, the District Court properly deferred to the arbitrators in resolving an issue that had not been determined in their award—one that both parties were entitled to have an answer to—the question of the time and manner the award is to be paid by Sollitt to Sparks.

The authorities are clear that when an important issue is submitted to an arbitration panel and the award of the panel does not pass on that issue, the award is indefinite. Then remand to the panel is a proper method of disposing of the issue. Such a procedure does not in those

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* It is clear that the District Court did not have to search the record of the arbitration proceedings as Sparks suggests for on the face of the award it was impossible to tell whether the arbitrators considered themselves to have jurisdiction over the payment clause or whether they considered it, if they did, and ruled on it.

cases, any more than it did here, require the arbitrators to reconsider the legal basis of their award. Such is clearly the intent of section 10(d) of the Federal Arbitration Act in allowing a remand. *E.g., International Ass'n of M. & A. Wkrs.* v. *Aerojet-General Corp.*, 263 F.Supp. 343 (D.C. Cal. 1966); *Todd Shipyards Corp.*, v. *Industrial U. of Marine & Ship Wkrs.*, 242 F.Supp. 606 (D.N.J. 1965); *Carr* v. *American Ins. Co.*, 152 F.Supp. 700 (E.D. Tenn. 1957); *Arlington Towers Land Corp.* v. *John McShain, Inc.*, 150 F.Supp. 904, 925 (D.C. Dist. 1957); *Application of Zephyr Const. Co., Inc.*, 7 A.D. 2d 915, 182 N.Y.S. 2d 946 (1959);* *Overseas Distrs. Exch., Inc.* v. *Benedict Bros. & Co., Inc.*, 5 A.D. 2d 498, 173 N.Y.S. 2d 110, 112 (1958);* *In Re E. A. Laboratories, Inc.*, 50 N.Y.S. 2d 222, 223 (Sup. Ct. 1944);* *Cf., LaVale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967).

As the above cases clearly indicate there is no conflict with the decisions of this Court. The decision of the Seventh Circuit is in accord with *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956). The lower federal courts have had no difficulty in determining a consistent meaning to be given the term "definite" under 9 U.S.C. § 10(d) (1965), and acting in accordance with decisions of this Court.

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* The New York Arbitration Act and cases under it may be looked to to aid in interpreting the Federal Arbitration Act. *The Hartbridge*, 57 F.2d 672, 673 (2d Cir. 1932), cert. denied, 288 U.S. 601 (1933).

B. There Is No Question That Needs to Be Settled By This Court.

There is no question presented by Sparks or this case worthy of a discussion by this Court. Sparks misconstruing questions of how a "lump sum" award is reached by the Arbitrators with questions of how a "lump sum" award is to be paid when such is an issue between the parties clearly shows the lack of any meritorious question.

Furthermore, the very case Sparks relies upon as showing a "recurring" problem is one that does not even discuss or consider the Federal Arbitration Act. *LaVale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967). That case also is consistent with other decisions of the Federal Courts which have in fact been confronted with issues arising under the Federal Arbitration Act.

IV.

There Is No Need For This Court To Exercise Its Power Of Supervision.

Sparks audaciously calls for this Court to overrule a decision which has called for arbitrators to render answers to issues that have been presented to them, and that confirms those very answers. True, more than two years have elapsed since the arbitration proceeding was commenced, but the very fact that the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) was enacted was to assure to those who so chose to use arbitration that arbitration be used to decide issues of dispute between the parties. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Clearly Sollitt should not be penalized for using the pro-

cedures provided under the case law and by the Federal Arbitration Act as Sparks seeks to have this Court do.

Now that the arbitrators have answered unequivocally in a manner that Sparks does not like, Sparks seeks to subvert the arbitration and judicial procedures provided under the Federal Arbitration Act by having an award confirmed that left the parties with an important issue unresolved. Now because the arbitrators have stated that they are without jurisdiction to determine that issue, it is a proper one for the District court to decide. See *J. P. Greathouse Steel Erectors, Inc.* v. *Blount Bros. Constr. Co.*, 374 F.2d 324 (D.C. Cir.) cert. denied, 389 U.S. 847 (1967). Sparks, if it desires to have a speedy adjudication of the time and manner the award is to be paid by Sollitt, should seek to expedite the procedures in the court below, rather than attempting to disclaim the acts of the arbitration process which at one time it so ardently sought.

Finally, because of the uniqueness of the Sollitt-Sparks subcontract and factual background of this case, it is highly unlikely that the decision of Seventh Circuit will affect others.

There is no reason given in Sparks' petition nor is there one sufficient to require this Court to grant the petition for writ of certiorari on the basis that an exercise of this Court's supervisory powers is called for.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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